

1 L9ENWTCC

2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK

-----x

4 IN RE: TERRORIST ATTACKS ON  
SEPTEMBER 11, 2001.

03 MD 1570 (GBD) (SN)

5 -----x

Telephone Conference

6 New York, N.Y.  
7 September 14, 2021  
8 3:48 p.m.

Before:

9 HON. SARAH NETBURN,

10 U.S. Magistrate Judge

11 APPEARANCES

12 KREINDLER & KREINDLER LLP

Attorneys for Plaintiffs' Executive Committee

13 BY: STEVEN R. POUNIAN  
14 ANDREW MALONEY  
JAMES KREINDLER  
MEGAN BENETT

15 -and-

MOTLEY RICE LLC

16 BY: ROBERT T. HAEFELE  
JODI FLOWERS  
17 JADE HAILESELAASSIE  
C. ROSS HEYL

18 -and-

ANDERSON KILL P.C.

19 BY: JERRY S. GOLDMAN  
BRUCE STRONG

20 -and-

COZEN O'CONNOR P.C.

21 BY: SEAN P. CARTER  
SCOTT TARBUTTON  
22 STEPHEN COZEN

23 KELLOGG HANSEN TODD FIGEL & FREDERICK PLLC

Attorneys for Defendant The Kingdom of Saudi Arabia

24 BY: MICHAEL K. KELLOGG  
GREGORY G. RAPAWY  
25 ANDREW C. SHEN

## APPEARANCES (Continued)

SPEISER KRAUSE

Attorneys for Ashton Plaintiffs

BY: JEANNE O'GRADY

MOLO LAMKEN LLP

Attorneys for Defendant Dallah Avco

BY: ROBERT K. KRY

BERNABEI &amp; KABAT, PLLLC

Attorneys for Saudi individual and corporate defendants

BY: ALAN KABAT

AUDREY STRAUSS

United States Attorney for the

Southern District of New York

SARAH S. NORMAND

JEANNETTE VARGAS

Assistant United States Attorneys

1 (Previous portion electronically recorded)

2 THE COURT: I have a question for you. I thought I  
3 understood from Ms. Normand's presentation that the second  
4 category -- obviously category one has been produced. That is  
5 what you were just referring to.

6 MR. POUNIAN: Right.

7 THE COURT: But the second category was documents that  
8 were withheld in this litigation so they were responsive on  
9 discovery requests or subpoenas I should say, and withheld  
10 because of various privilege assertions. And presumably but  
11 for those privilege assertions, you would have received them  
12 earlier in the litigation.

13 With respect to categories three and four, it is not  
14 my understanding that those are documents that were withheld in  
15 this litigation. I recognize that they are related to the 9/11  
16 attacks broadly, but it is not my understanding that those are  
17 documents were requested by subpoena and withheld on various  
18 privilege grounds and that you would have otherwise received  
19 but for the privilege assertions that have now been released.

20 MR. POUNIAN: They were not withheld, your Honor, on  
21 the grounds of privilege I don't believe. But they were  
22 withheld as part of this core records approach that the  
23 government had used in producing documents. We had asked for  
24 several of these documents from the Pentagon investigation  
25 specifically items related to witness statements regarding

1 Fahad al-Thumairy's extremism, witness statements from people  
2 at the King Fahad Mosque who were testifying, who had told the  
3 FBI about Fahad al-Thumairy extremism, that were never  
4 produced, things that were referenced in, for instance, the  
5 9/11 Commission report that was issued in 2004 that we were  
6 never given an opportunity to see. Those would be in the  
7 PENTTBOM investigation. There's also phone records related  
8 there to individuals at issue here. All of these things were  
9 requested in our original April 2018 subpoena. The government  
10 claimed they were just going to focus on a group of documents  
11 that they selected and that's one of the issues here. There is  
12 also --

13 THE COURT: Sorry. Before we move on, I appreciate  
14 the recollection. The core records approach, which was  
15 obviously litigated, was mostly a question about both relevancy  
16 and burden, and the Court concluded that the FBI's approach was  
17 reasonable, and so this is a roundabout way of me focusing on  
18 these second categories which pushes us deeper into 2022, that  
19 these were documents that you were not getting in this  
20 litigation not because of privilege, but for other reasons, and  
21 it seems to me that holding up the litigation for those  
22 documents, this category of documents would be a revisiting of  
23 my earlier decision, which, like I said, was quite well  
24 litigated on whether or not that narrowing was appropriate in  
25 the first instance.

1 MR. POUNIAN: I understand, your Honor. I believe  
2 that the executive order itself reflects the fact that the  
3 government has now in effect changed its position and now  
4 believes that it makes sense that for the purpose of full  
5 accountability, for purposes of making certain that the record  
6 is complete, that we have all of the facts before us that are  
7 necessary for our case, which is specifically referenced here  
8 in this order, that these specific documents, that these  
9 specific documents be provided. And they are tailored, they  
10 are limited to references to the individual subjects of the  
11 subfile investigation.

12 So these documents were in essence part of the subfile  
13 by virtue of the fact that the subfile investigation continued  
14 investigation of these specific individuals. The last  
15 category, your Honor, doesn't even include things from PENTTBOM  
16 or the subfile investigation, but actually the individual  
17 investigations of the Saudi government officials, which we  
18 asked for in our subpoena.

19 MR. CARTER: Your Honor, this is Sean Carter.

20 May I briefly address this issue as well?

21 THE COURT: Go ahead.

22 MR. CARTER: Your Honor, my recollection is that the  
23 government's burden claims and resort to the core documents  
24 approach were bound up in its representations that the subfile  
25 investigation was active and ongoing and that all of the

1 documents encompassed within that were classified and therefore  
2 sensitive. And the government's view is that, because of those  
3 features of the documents and the active status of the  
4 investigation, the review of the documents would take sort of a  
5 painstaking process and therefore be too burdensome.

6 And so the grounds for relieving the United States of  
7 the obligation to respond to the subpoena specifically  
8 requesting these documents were removed by virtue of both the  
9 closure of the investigation and by virtue of the President's  
10 executive order directing the government to do this, thus  
11 eliminating any potential burden claim. But these were always  
12 of central relevance and of key importance and directly at  
13 issue in the subpoena. Were it not for the open and active  
14 status of the investigation, we certainly would have been  
15 entitled to them, and the government's burden claims would not  
16 have been well founded under those circumstances and certainly  
17 aren't now.

18 Just turning the Court's attention to the latest  
19 category, as Ms. Normand mentioned, there is a specific  
20 requirement there that the government conduct a review of any  
21 separate or subfiles that were created to look into any  
22 potential agency relationship of these subjects to any foreign  
23 government. It is our understanding, has always been our  
24 understanding that there would have been particular subfiles  
25 and files established to try and figure out what these people

1 were in fact doing for the Saudi government during these time  
2 periods. So this is, you know, a central category of relevance  
3 that was walled off only by virtue of a burden claim that was  
4 bound up in the open status of the investigation and classified  
5 nature of the documents, both of which have just changed.

6 THE COURT: Thank you.

7 MR. POUNIAN: Your Honor, may I raise one more thing  
8 here.

9 THE COURT: All right.

10 MR. POUNIAN: Your Honor, in the report that was just  
11 issued over this past weekend, it references an example of the  
12 type of material that would be in the PENTTBOM file that would  
13 not necessarily be in the other privileged documents that are  
14 going to be produced.

15 For instance, it says that approximately one month  
16 after 9/11 someone was interviewed and stated that she meet  
17 Bayoumi multiple times and Bayoumi was always talking about how  
18 the Islamic community needs to take action, and he told her and  
19 her husband on several occasions they were at jihad, they were  
20 at jihad.

21 This is specific evidence that would be in the  
22 Pentagon investigation of a witness interview referring to  
23 Bayoumi's state of mind and motivation and the reason why he  
24 would be joining in this effort along with these other Saudi  
25 government employees to provide a support network for the

1 hijackers.

2 We believe there's similar statements like that of  
3 Mr. Thumairy, and those were not produced to us in this case  
4 yet. And those are what we would expect would be produced on  
5 January 1 pursuant to the President's order.

6 As I said, we would like them to be produced sooner,  
7 but we understand that that may not be possible, but they had  
8 promised at one point to do this as expeditiously as possible.  
9 And perhaps there could be some items that could be put on a  
10 faster schedule. I don't know. But this is an example, your  
11 Honor, of the type of material that was collected during the  
12 PENTTBOM investigation that is of great relevance to the  
13 inquiry here.

14 THE COURT: Mr. Pounian, what is your view about dual  
15 tracks of expert witnesses. It's my understanding that maybe  
16 half of your experts are going to be historians who are going  
17 to be describing for the Court the history of the region and  
18 other relevant historical facts. What would preclude you from  
19 exchanging those reports on a faster track?

20 MR. POUNIAN: Your Honor, we believe that the evidence  
21 that's being produced impacts all of the expert's reports.  
22 They are all interrelated, number one. But they are also  
23 relating these facts about history, about religion, about the  
24 terrorist groups that are involved. They're relating those  
25 things about which they have expertise to the particular facts



1 of the case. Like, for instance, in this report over the  
2 weekend there's five different terror groups that are  
3 referenced. Those all requires an expert to really explain who  
4 are these groups, how are they related, how are they related to  
5 al-Qaeda, how could they possibly have any relationship to the  
6 people who are at work here.

7 And it's the same with the religious group within the  
8 Ministry of Islamic Affairs, the religious officials who were  
9 working there and their motivations and, you know, how they  
10 viewed their role to be.

11 So we don't really think it would make sense to do  
12 this in a piecemeal fashion, and I don't think there would  
13 really be any advantage at the end of the day in terms of  
14 timing to do it that way. We think it makes more sense to have  
15 them all produced at the same time.

16 THE COURT: All right.

17 MR. CARTER: Your Honor. It's Sean Carter. Could I  
18 just very briefly touch upon an issue related to that, and one  
19 sort of broader-picture issue.

20 THE COURT: Sure.

21 MR. CARTER: You know, I think fundamentally at issue  
22 here is sort of a basic due process principle about the  
23 traditional opportunity afforded a party to collect facts and  
24 evidence before being compelled to present his or her case in  
25 chief and in principle.

1           You know, in the terrorism arena, as *Owens* and other  
2 of the decisions make very clear, experts play a very unique  
3 and compelling and critical role in the presentation of that  
4 case in principle, including in areas where jurisdiction under  
5 one of the FSIA's terrorism-related exceptions are in issue.

6           The executive order makes clear that all of the  
7 categories of documents, the policy reflected here is a  
8 compelling interest stated by the President that the plaintiffs  
9 in this litigation will have the benefits of these facts and  
10 evidence for purposes of their pursuit of accountability.

11           As your Honor mentioned, there's numerous references  
12 to the litigation specifically and in the preamble to the  
13 overall effort of the families to pursue accountability.

14           So, the executive order, the fulfillment of the  
15 executive order's goals and purpose indicates that the  
16 plaintiffs should have the opportunity to collect this evidence  
17 before presenting their case in principle, including their  
18 experts.

19           As to this dual-track idea, you know, I think it's  
20 important to understand that any presentation of a case is sort  
21 of a collective endeavor, and all the different piece parts  
22 relate to one another and are integrated as part of a  
23 collective whole through which the parties, you know, decide  
24 how best to put their evidence forward. So dual tracking  
25 experts disrupts that traditional sort of process of trying to

1 do the best to present the most coherent streamlined and  
2 integrated case possible.

3 THE COURT: Thank you.

4 Why don't I turn to Mr. Rapawy.

5 MR. RAPAWY: Thank you, your Honor. Gregory Rapawy  
6 from Kellogg Hansen for Saudi Arabia.

7 I was glad to hear the Court say at the outset of this  
8 hearing that it is inclined to set firm deadlines. I think  
9 that is an appropriate approach here, perhaps a necessary one.  
10 And I think that in considering the arguments that you have  
11 just heard from plaintiffs, you should, and I am sure you will,  
12 note the point that Mr. Pounian began by saying that plaintiffs  
13 are not in control of this process.

14 In a sense that is, of course, true. We are dealing  
15 with the executive order that the President has issued. But  
16 the other side of that coin is the process that has just  
17 concluded, the three years and three months of jurisdictional  
18 discovery supervised by the Court, is the process that gave  
19 plaintiffs what they were entitled to. And we are dealing now  
20 with an additional second voluntary production by a nonparty  
21 over and beyond what plaintiffs were entitled to under the FSIA  
22 and certainly under due process.

23 In response to some of Mr. Pounian's comments, I would  
24 like to make clear that, in our view, which we are eager to  
25 present to the Court, jurisdictional discovery has revealed no

1 evidence to support the key allegation that prompted Judge  
2 Daniels to order it, and that is to say no evidence that Musaed  
3 al-Jarrah or on any other Saudi Arabian official, senior or  
4 otherwise, directed Omar al-Bayoumi Fahad al-Thumairy or anyone  
5 else to assist the 9/11 hijackers nor any evidence that  
6 al-Bayoumi or al-Thumairy themselves directed anyone else to  
7 help the hijackers. And that is not because the process, as  
8 the Court well knows, has been anything less than thorough and  
9 searching. It is because those things did not happen.

10 And the FBI's decision to release additional material  
11 from an investigation that is now closed is not likely to  
12 change that outcome. Based on the record that is currently  
13 before the Court, the Court has no basis to conclude that  
14 anything the FBI is likely to produce will change that state of  
15 affairs.

16 Certainly the document that was released last Saturday  
17 is not a basis to extend discovery. It does not support  
18 plaintiff's theory that al-Bayoumi and al-Thumairy received  
19 directions from a senior Saudi official. It does not even  
20 mention the third subject of the investigation, Musaed  
21 al-Jarrah, at all, and there is nothing in it to suggest that  
22 the investigative theory from the previous partially released  
23 2012 summary report that al-Jarrah had tasked the other two men  
24 with assisting the hijackers ever bore fruit.

25 In our view, the extensive discovery that has occurred

1 to date, including the depositions that have already been  
2 taken, has only discredited plaintiffs' allegations. I will  
3 not rehearse the amount of discovery that has already gone on.  
4 The Court is well familiar with it. The tens of thousands of  
5 pages from Saudi Arabia and for that matter from the FBI,  
6 including documents to which, in any ordinary case, and I  
7 recognize this is not an ordinary case, but in any ordinary  
8 case they would not have had even a fraction of that material  
9 either from institutions that were protected from disclosure by  
10 the Vienna Conventions or as against the FBI, the release of  
11 documents subject to the Privacy Act, the grand jury material.  
12 I cannot go on this public record into any detail into what  
13 that material has shown, but the Court has seen a great deal of  
14 it in the course of this process, and it has not got plaintiffs  
15 what they need.

16 Our position, and I understand that the Court has  
17 stayed discovery, but our position has been that expert  
18 discovery can and should proceed alongside the FBI process, and  
19 does not in any way need to await the conclusion of that  
20 process.

21 Let me make clear that in saying that that Saudi  
22 Arabia does not oppose and never has opposed the United States'  
23 decision to release investigative materials to the public. The  
24 embassy has publicly supported the President's decision to  
25 declassify these documents, and that is consistent with Saudi

1 Arabia's longstanding position going back many years. What we  
2 do object to is an indefinite delay of our renewed motion to  
3 dismiss. Because if the history of this case has taught the  
4 Court anything, it is that there will always be one more thing  
5 that plaintiffs want, one more thing that they demand and say  
6 that they are entitled to in order to prove their claims.

7 For many years it was the 28 pages from the 2002 joint  
8 inquiry report that were declassified in 2016, and those were  
9 going to break the case open until they were declassified, and  
10 they didn't.

11 Then after that -- this was actually before your Honor  
12 was I think supervising discovery, I think it was during the  
13 tenure of Judge Maas, it was the jailhouse testimony of  
14 Zacarias Moussaoui, which delayed the case for months, because  
15 that was going to be critical evidence -- the same word that  
16 Mr. Pounian used today -- critical evidence the plaintiffs  
17 needed to prove their case. And then it became a footnote in  
18 one of Judge Daniels' opinions dismissing the case before  
19 JASTA.

20 And then after that it was JASTA itself. And they  
21 went to Congress and argued, as they had every right to do,  
22 that they would look forward to their day in court once they  
23 had jurisdictional discovery under a more favorable  
24 jurisdictional standard, which they got, and yet they are not  
25 how looking forward to that renewed motion to dismiss after

1 this lengthy jurisdictional process in which the Court has  
2 taken great pains to implement JASTA's requirements.

3 And then even after that it was the 2012 FBI report,  
4 and the third name that was originally concealed but turned out  
5 to be Musaed al-Jarrah -- that's in the public record now -- as  
6 the third main subject of the investigation. And when that was  
7 released that was going to change everything too, until it  
8 didn't.

9 And now it's the 2015 report which they have. And  
10 they can get to their experts, and their experts can say what  
11 they like about it. That was going to change everything, too,  
12 until it's come out, and now they want until March.

13 And if your Honor gives them until March, then as sure  
14 as we are all sitting here today, in March there will be more.  
15 There will be requests to reopen depositions. There will be  
16 requests for more documents. There will be another round of  
17 discovery because of things that they say are new in what was  
18 produced. There was a certain point at which the Court will  
19 have to draw a line, and we submit that we are at that point.

20 The September 15 deadline which was stayed is not  
21 crucial. The exact date is not critical, the beginning of  
22 November is perhaps not unreasonable. But there should be a  
23 deadline. Not only should there be an initial deadline for  
24 expert discovery to begin, but there should be a schedule for  
25 expert discovery to proceed. There should be a deadline for

1 rebuttal reports. We requested for now 45 days to prepare  
2 those. We think that's still appropriate, given the volume of  
3 material that the plaintiffs are apparently planning to  
4 produce.

5 We don't think the reply reports need to be built into  
6 the schedule, but one way or the other the Court should decide.  
7 Our view, which is presented in the papers, is that reply  
8 reports are only necessary or appropriate when new matters are  
9 raised in rebuttal reports, and we don't plan to raise any new  
10 material in our rebuttal reports.

11 If there are no reply reports, we would like to start  
12 taking expert depositions after plaintiffs serve their initial  
13 reports. We think that's the most efficient way to do things.  
14 If there are reply reports, then we have to wait, because we  
15 don't -- I think it would be prejudicial to us to begin taking  
16 depositions before, of experts who had a report still left to  
17 serve and then have the ability to fix basically problems in  
18 their reports in response to their depositions.

19 THE COURT: Can I ask you a question Mr. Rapawy.  
20 Sorry to interrupt you. But I think out of respect to the  
21 President's actions I think I have to move the deadline to file  
22 expert reports, at least to accommodate that first disclosure.

23 My question for you is what position -- and I don't  
24 know if you can give me your view right now -- but what  
25 position your client would take, if after the filing of an



1 expert report, let's say several months later, another piece of  
2 information is released that the plaintiffs wish to rely on.  
3 Would you object to relying on that in whatever motion is  
4 ultimately filed to Judge Daniels, whether it's a motion to  
5 dismiss or some other filing if it came after the deadline for  
6 expert discovery?

7 MR. RAPAWY: There's exactly two questions there, if I  
8 may your Honor. One is whether the expert can supplement the  
9 report. And I think there is an established standard for  
10 supplementing the report, and if they meet that standard for  
11 supplementing the report, then we would not object to the  
12 supplementation.

13 Now, I say that reserving our rights to disagree on  
14 any particular, any particular instance about whether a  
15 particular piece of evidence is genuinely new. But if it is  
16 new and material, it would be appropriate for supplementation.

17 With regard to the jurisdictional statements of fact  
18 and evidence, our position would be we do think that those need  
19 to be pretty close to final, and I think that there should be a  
20 showing of good cause to amend them based on something that's,  
21 again, genuinely new and genuinely wasn't available before.  
22 And I think that that good cause standard would be the same as  
23 for any other situation in which new evidence comes in after a  
24 deadline has been set and a scheduling report, and I think that  
25 is an appropriate way to deal with that problem.

1           THE COURT: This may be an unnecessary focus right  
2 now, but the question I'm asking is not if the document --  
3 let's say a smoking gun document is issued in response to that  
4 fourth tranche which we anticipate will be released around late  
5 or early March. If at that point expert reports are already  
6 in, but let's just for the purposes of this conversation assume  
7 that the briefing for that motion has not begun, would you  
8 object to the plaintiffs relying on that document?

9           MR. RAPAWY: If it's genuinely new and material, your  
10 Honor, I don't think we could object to that, and I think our  
11 objection would be rejected anyway. Obviously it's a  
12 hypothetical, and it's certainly possible that we would  
13 disagree. In fact, if the past is any guide, we probably will  
14 wind up disagreeing about whether facts are new and material.  
15 But we don't think that that is a reason to push the entire  
16 process out until the conclusion of the process in the FBI  
17 report -- I'm sorry, in the executive order, particularly in  
18 light of the fact that plaintiffs have already had that first  
19 round of jurisdictional discovery, if you can call it just one  
20 round, including the multiple motions to compel against both  
21 Saudi Arabia and the FBI.

22           Is that responsive to your Honor's question?

23           THE COURT: It is. Thank you.

24           MR. RAPAWY: And then it's sort of -- oh, and I think,  
25 one thing which I also would bring up that we had raised in the

1 letter is the *Daubert* motions. I think those can be provided  
2 in parallel with the renewed motion to dismiss. I think they  
3 should be. Obviously we haven't seen expert reports yet. We  
4 don't know for sure if there will be any *Daubert* motions, but  
5 it certainly seems like a possibility the schedule ought to  
6 contemplate, and I think doing it in parallel with the renewed  
7 motions-to-dismiss practice, so that it basically all lands on  
8 Judge Daniels' desk at the same time would be the most  
9 efficient way to do that.

10 And just to sum up, your Honor, the particular  
11 deadlines, while they are important, are less important than  
12 the fact that there be deadlines, and that is because  
13 jurisdictional discovery under the FSIA, as the court knows  
14 well, is limited because it is taken before plaintiffs even  
15 establish that the Court has jurisdiction over a foreign  
16 sovereign.

17 That process should not be held open indefinitely so  
18 that the government can review and rereview its files in a sort  
19 of extrajudicial discovery mechanism, and I think that an  
20 interest that the Court should bear in mind here, recognizing  
21 the interest that the Court has stated in respect to the  
22 executive order, but there is also at stake in this case the  
23 right of a foreign sovereign to an adjudication of its immunity  
24 defense as close to the outset of the case as reasonably  
25 possible. On the record that we have made so far, we are

1 confident we will prevail on that motion and I think that if  
2 plaintiffs disagreed with that, you would not see them so eager  
3 to push this deadline out.

4 That's all that I have, your Honor.

5 THE COURT: Thank you.

6 Let me ask, for Mr. Carter, anyone else wish to  
7 respond.

8 MR. POUNIAN: I would like to respond, your Honor, if  
9 I may.

10 THE COURT: Sure.

11 MR. POUNIAN: Steve Pounian for the plaintiffs. Your  
12 Honor had mentioned, like, smoking-gun evidence. You know,  
13 it's clear that in the view of Saudi Arabia, when they view the  
14 evidence and how they portray it, they don't see connections  
15 between things. Their witnesses don't remember things. They  
16 refuse to answer questions about things they should know about.

17 But it is clear in any case involving a terrorist, in  
18 any case involving criminal activity of this nature that's  
19 organized and has a state sponsor of this nature that they're  
20 not going to come forward and simply say, you know, I did meet  
21 that person or I did do that.

22 And, for instance, in this report that was just  
23 produced over this weekend, we now know for the first time that  
24 Mutaib al-Sudairy, a diplomat at the embassy in Washington who  
25 had full diplomatic privileges, who had full immunity from

1 prosecution, was brought into Saudi Arabia, given that  
2 protection -- brought in from Saudi Arabia, given the  
3 protection by the Saudi embassy, and sent into the middle of  
4 the United States into Missouri to meet with an al-Qaeda  
5 procurement officer with whom he lived for four months.

6 Now, that fact in and of itself, that would not be a  
7 smoking gun. But then we look at the phone records and the  
8 phone records show that Mr. Sudairy called Mr. Bayoumi --  
9 Mr. Bayoumi called Mr. Sudairy five times, times that are  
10 significant logistic support to the hijackers right around the  
11 time they are moving from Los Angeles to San Diego.

12 Now that fact itself of the phone calls may not be  
13 important, but you combine that with the fact that he's living  
14 with an al-Qaeda procurement officer, well, then there is  
15 another fact, that Mr. Sudairy came to San Diego the year  
16 before and met with Mr. Bayoumi at the mosque and also stayed  
17 in the same house that the hijackers eventually stayed in.

18 So you take all these facts together just from  
19 Mr. Sudairy and you take this report and you're wondering,  
20 like, okay, I guess Saudi Arabia doesn't think that adds up to  
21 a support scheme, but you take those facts with the other facts  
22 that we're trying to get, we're trying to nail down from the  
23 government, from the FBI that they've put together over all  
24 these years. Now we've waited, the families have waited 20  
25 years for this. They're willing to wait another six months so

1 that this case is determined on a full record. And I don't  
2 want to have expert reports submitted and then have 50 motions  
3 and they make. They prepared great motions, your Honor, but we  
4 shouldn't be nitpicking all of these issues now, and we  
5 shouldn't be arguing them in advance like this. We should let  
6 the experts put forward reports based on the full record.

7 I would love it if the Court said to the DOJ, let's  
8 get everything, can you do everything by, you know, November 15  
9 or December 15. That would be great. We would want it done  
10 tomorrow. We want the evidence now.

11 But, I mean, this is kind of key stuff we are just  
12 finding out about now. It's just the very nature of this type  
13 of activity. It's not something that is going to be staring  
14 out at you right in the face. It has to be developed, you  
15 know, circumstantial, brick by brick, and that's how every  
16 terrorist support case is done. And that's how they're all  
17 presented, your Honor. We have to be given the opportunity to  
18 do that here.

19 Oh, and there's one other fact about Mr. Sudairy I  
20 have to mention. His brother, who assigned him to go to the  
21 United States the first time when he met with Mr. Bayoumi, his  
22 brother is a deputy minister of the Ministry of Islamic  
23 Affairs, and he's also a director of the Al-Haramain  
24 Organization, which was named as a terrorist organization. So  
25 there's a cancer here, there was a cancer within this Ministry

1 of Islamic Affairs that we are addressing here in this case,  
2 and it's not a simple issue.

3 We are not the FBI. We are not the CIA. We don't  
4 have the powers to go in and do the work that has to be done to  
5 ferret this out. And we need those documents, your Honor. We  
6 need the basic facts to do that.

7 And, you know, we can talk about legal standards and  
8 everything until we are blue in the face, but it is not going  
9 to get to the truth of what we get here. And when Mr. Rapawy  
10 talks about the standards here, about this case, he never talks  
11 about the agency standard, what the legal standard is. He  
12 doesn't refer to the JASTA standard that has just been  
13 established by the Second Circuit in the Kaplan case this  
14 summer, because those cases establish a test that I think we  
15 are going to meet in this case. And he doesn't want to do  
16 that. He just keeps referring to carefully worded language  
17 that seems to, you know, doesn't meet a standard, but it's not  
18 really what the legal standard is in this case. I don't know  
19 if Mr. Carter has anything to add, but I just wanted.

20 MR. HAEFELE: Your Honor, this is Robert Haefele. I  
21 do have something to add if you would listen to me for a  
22 moment.

23 THE COURT: Go ahead, Mr. Haefele.

24 MR. HAEFELE: Thank you, your Honor.

25 I just wanted to respond to a few things that

1 Mr. Rapawy did say as well.

2 First of all, the plaintiffs have never said that  
3 there is any sing particular document, if we just got this  
4 document that that's all we would need. Throughout the  
5 litigation, as you have referenced earlier today, we have tried  
6 to work with the DOJ to prioritize certain documents and try  
7 and get certain things through as promptly as possible. But  
8 we've never said this is the only thing that we need.

9 Plaintiffs are entitled to a fulsome response to the  
10 discovery requests, and, you know, Mr. Rapawy indicated we've  
11 already gotten what we're entitled to but plaintiffs are  
12 entitled to the full response to the subpoena, and the  
13 President's executive order seems to make clear that there's  
14 more evidence that the government has that we are entitled to.  
15 The Kingdom's notion that throughout all of this discovery  
16 that's happened -- which, by the way, we have had to fight  
17 tooth and nail to get, that the Kingdom's unilateral assessment  
18 is that there is nothing there, ignores, as Mr. Pounian just  
19 said, ignores the plaintiff's collection of evidence and the  
20 manner in which those pieces of evidence pieced together make a  
21 fulsome picture.

22 You cannot, as Mr. Rapawy continues to try and do, you  
23 cannot look at every single individual piece of evidence  
24 singularly and determine yes or no without looking at the whole  
25 picture together. And the 2016 EC that came out on Saturday is



1 a good example of that. Without knowing who the individuals  
2 are that are identified in that document, even the media seems  
3 to be saying that there's no Saudi officials in it. There's  
4 eight Saudi officials that are referenced in that document  
5 that -- eight Saudi officials a lot of them with the Ministry  
6 of Islamic Affairs, many of them had diplomatic credentials  
7 that were Saudi officials. So for Mr. Rapawy to say that there  
8 was nothing in that document that connected to anything in  
9 plaintiff's case is absolutely a farce.

10 So, notwithstanding the Kingdom's objections, the  
11 plaintiffs are entitled to collect the information and they're  
12 entitled to get what the government has said that it has.

13 THE COURT: Thank you.

14 MR. HAEFELE: Thank you.

15 MR. CARTER: Your Honor, this is Sean Carter. I don't  
16 want to belabor this, but just very quickly.

17 THE COURT: I'm happy to hear from you Mr. Carter, but  
18 I don't want to try this case on this discovery call.

19 MR. CARTER: Yes.

20 THE COURT: If you want to discuss how you are going  
21 to prove your case, you don't need to talk about that now.

22 MR. CARTER: I don't, your Honor.

23 I just wanted to address, you know, Mr. Rapawy's  
24 suggestion about a parallel process here, and I think his  
25 comments effectively acknowledge that if we go down that road,

1 there's going to be briefing as to every proposed  
2 supplementation of an expert report. There's going to be  
3 briefing and disputes related to every proposal to use a piece  
4 of information that comes in later as a result of the  
5 President's executive order, and there is just going to be  
6 massive complication that will only serve to delay the  
7 proceeding and complicate it even further. That's all, your  
8 Honor.

9 THE COURT: Mr. Carter, your colleague Mr. Pounian,  
10 his proposal at the outset was let's just sit tight for 45 days  
11 and have you all file a letter for me in early November. I am  
12 not quite sure what the benefit of that will be, because I  
13 assume your position then will be the same as now, but I am  
14 wondering if you have a particular view as to why rather than  
15 sitting deadlines now we should have a wait-and-see approach.

16 MR. CARTER: Your Honor, we can set deadlines provided  
17 that they accommodate the process reflected in the executive  
18 order, which, you know, involves the declassification of the  
19 precise categories of information classification that were the  
20 subject of the subpoena we served six days after being  
21 authorized to conduct discovery in this case. We can have an  
22 expert deadline set after that. Our thinking with regard to  
23 maintaining a dialogue with the Court as this goes forward is  
24 there are likely to be the issues surrounding this process that  
25 we could deal with on a proactive basis.

1 I think Ms. Normand mentioned, for example, that there  
2 will likely be, you know, information produced publicly, and  
3 then a process for the DOJ to give us a bit more pursuant to  
4 the protective order. So we thought that an ongoing dialogue  
5 with the Court about those issues would keep the process moving  
6 and prevent us from having any sort of backlog at the end of  
7 the process.

8 THE COURT: Understood. Okay.

9 Anybody else wish to be heard?

10  
11 MR. KRY: Your Honor, this is Rob Kry for Dallah Avco.  
12 I don't have much to add to what Mr. Rapawy has already said,  
13 but I will echo those points, and just note that they apply  
14 with even greater force to Dallah Avco. As your Honor might  
15 recall, Dallah Avco was a Saudi government contractor whose  
16 essentially only connection to this case was that it provided  
17 certain outsourced human resources functions to a Saudi  
18 government project, and in connection with that did process  
19 some of the payroll for people attached to that project, like  
20 Mr. al-Bayoumi.

21 Dallah Avco never directed the work of employees on  
22 that project. It never supervised the work of employees on  
23 that project. It was really just performing those outsourced  
24 functions. So when Mr. Rapawy says that nothing in the FBI's  
25 productions over the past year has remotely incriminated his

1 client, that applies a hundred times over with respect to  
2 Dallah Avco. Conversely, your Honor, when Mr. Rapawy pointed  
3 out that the Kingdom had already endured three and a half years  
4 of jurisdictional discovery, Dallah Avco has been in  
5 jurisdictional discovery at this point for eight years. We had  
6 our first document requests served against us back in 2013. So  
7 this has been a very, very long process. So, just like the  
8 Kingdom, we are also interested in being cleared of these  
9 allegations sooner rather than later.

10 With respect to the specifics of the process, we defer  
11 to Mr. Rapawy. We would just, you know, your Honor, like he  
12 did, that whatever date your Honor sets be sooner rather than  
13 later and respect the very weighty interests that are on our  
14 side of the case, too.

15 THE COURT: Thank you.

16 All right. Thank you, everybody. I appreciate  
17 everybody's arguments and your submissions. I am going to take  
18 all of this under advisement and issue a scheduling order in  
19 the next few days. That order will be firm and will not be  
20 subject to revision, and it at a minimum is going to permit  
21 expert discovery to be produced at some time after at least  
22 that second tranche.

23 I need to think a little bit more about holding  
24 everything off until March, recognizing all of the various  
25 competing interests, all of which I think are weighty. I just

1 need to sit on it for a little bit before I set a schedule, but  
2 I will do that this week, and will issue my order forthwith.

3 It will not contemplate rebuttal reports. There will  
4 be an opportunity for expert reports there will be an  
5 opportunity for -- I should say there will be rebuttal reports  
6 filed by the defendants, but it will not have a deadline for  
7 reply reports. I am not anticipating that there will be any  
8 sort of reply reports by the Plaintiffs' Executive Committee,  
9 and it will assume that expert depositions take place after the  
10 exchange of the reports so that the depositions can be  
11 conducted on a record where both sides have one another's  
12 experts beforehand.

13 So, at a minimum, you can contemplate a schedule that  
14 has the plaintiffs filing their reports, rebuttal reports by  
15 the defendants, and then a period of time for depositions.

16 I will issue an order, like I said, this week with  
17 those dates.

18 MR. CARTER: Your Honor, this is Sean Carter. I had  
19 one question related to what your Honor just described. We  
20 have never been clear as to whether Dallah Avco intends to  
21 offer affirmative expert reports. I think it would be helpful  
22 for the Court to know that in framing out the schedule.

23 THE COURT: Thank you.

24 And Mr. Kry, do you have a view on that? Is Dallah  
25 Avco anticipating filing affirmative reports, or only reports

1 in reply to the plaintiffs' reports?

2 MR. KRY: Your Honor, at this point we anticipate  
3 submitting one report that is going to be on the question of  
4 Saudi employment law.

5 Not having seen plaintiffs' reports, I don't know  
6 whether it would qualify as a rebuttal report or not.

7 The one thing we don't want is to further draw out the  
8 report process. So if it's your Honor's position that if we  
9 file a report that wouldn't qualify as a rebuttal report, that  
10 plaintiff needs to have a chance to respond to that, then I  
11 think the appropriate way to accommodate that would be to set a  
12 deadline for us that gives plaintiff a chance to respond, but  
13 does not at all extend the schedule with respect to discovery  
14 against the Kingdom.

15 THE COURT: Thank you.

16 Anything further?

17 I thought I heard someone else from the plaintiffs  
18 trying to speak

19 MR. POUNIAN: You did, your Honor. This Steve Pounian  
20 again.

21 Thank you, your Honor. On the reply report issue, I  
22 would like to be heard on that, because we didn't really  
23 address it in the discussion. I thought we were just  
24 discussing today the expert deadline, the specific stay of  
25 that.

1 But with regard to the reply report, Saudi Arabia in  
2 this case has the burden of proof. It's kind of a unique issue  
3 in terms of -- a unique case in terms of the burdens here. The  
4 plaintiffs have a burden, initial burden of production on the  
5 jurisdictional issue, but then once that burden is met, Saudi  
6 Arabia has the burden of proof on the issue. So their expert  
7 reports are really part of their case that they are presenting  
8 to meet their burden of proof. So I believe in that  
9 circumstance it makes sense for us to have the opportunity to  
10 reply to what they are putting forward on their burden of  
11 proof, if that is what they are doing. If they are just  
12 responding to our burden of production, that's a different  
13 question.

14 THE COURT: I am not sure I understand why you would  
15 need a reply report. I am not questioning your recitation of  
16 the burden, but your expert presumably will have an opportunity  
17 to respond during a deposition to any questions that are asked  
18 and any challenges that are raised, and it may be that your  
19 expert then gives testimony either by way of declaration or --  
20 I know you've raised the prospect of live testimony at the  
21 motion stage, but it is unclear to me why a report would be  
22 necessary.

23 MR. POUNIAN: I understand, your Honor. Mr. Rapawy  
24 had mentioned taking depositions before his reports were filed  
25 or during that process. And that's I guess that's what got my,

1 particularly got my rankles up on that issue.

2 THE COURT: Right. But I just said that we would have  
3 a full exchange of reports and then expert depositions.

4 MR. POUNIAN: Well, I understand your Honor. I guess  
5 part of it also is, depending on what is in their reports,  
6 there may be a need to reply, or I guess they could conceivably  
7 do it at the deposition, but I think it would make sense to  
8 have it in done in a formal sense in terms of a reply depending  
9 on what is in the reports. I mean, it is hard to know until  
10 you see the reports at this point.

11 THE COURT: Understood. Okay. Wonderful.

12 Thank you, everybody. I appreciate everybody's time  
13 and attention on this issue, and I hope everybody remains  
14 healthy and safe.

15 We are adjourned.

16 (Adjourned)